A

NUR AZMI SO'AIB

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: J-05-111-2010]

C

3 OCTOBER 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in 1,757.35 grams of cannabis - Appeal against conviction and sentence - Dangerous drugs found in motorcycle carrier - Whether accused had*

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knowledge of drugs - Whether accused was an innocent carrier - Whether defence an afterthought - Whether reasonable doubt raised - Whether presumption of trafficking rebutted - Whether defence considered by trial judge

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Upon receiving information that a certain drug transportation would take place, PW3 and a team of police party headed to the said area to conduct a surveillance. Several minutes later, PW3 observed a man ('the appellant') riding a motorcycle and parked the said vehicle near to where the police party was waiting. As

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the appellant remained on his motorcycle, PW3 and his team sprung into action and ambushed the appellant. In an attempt to flee the scene, the appellant tried to accelerate his motorcycle but was soon apprehended. Upon inspection, a red bag was found in the carrier basket of the motorcycle. Two compressed slabs of

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plant material were discovered in the bag which was later confirmed to be 1,757.35g of cannabis. In the High Court, the appellant was charged with the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). In his defence, the appellant contended that he was an

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innocent carrier and was instructed by one Romantika to deliver the bag which contained 'kain dan ubat' to one Aidil. According to the appellant, he did not know that the actual contents of the bag contained cannabis. The learned Judicial Commissioner ('JC') held that the appellant had failed to rebut the presumption of

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trafficking by failing to show that someone else was the real trafficker. The appellant was convicted of the offence and

sentenced to death. Hence, the present appeal. The issue that arose for determination was whether the JC considered the appellant's defences, *ie*: (i) that the appellant was an innocent carrier; and (ii) that Romantika was the actual trafficker.

Held (dismissing appeal; affirming conviction and sentence) Per Azahar Mohamed JCA delivering the judgment of the court:

(1) Although the JC did not mention the words 'innocent carrier', the appeal record indeed narrated the appellant's defence of innocent carrier. The form of words used by the JC in his judgment was a matter of his choice. What was important was that the defence of innocent carrier was adequately considered. Besides, the JC judicially appreciated and considered the defence at some length before arriving to a definite finding of fact. (paras 15-17)

(2) The appellant's defence of innocent carrier was an afterthought. The appellant was alone at the time of his arrest and no one nor any vehicles were spotted at the vicinity. The bag was found in the carrier of the motorcycle and in near proximity to the appellant, signifying the appellant's knowledge of the cannabis he was transporting. The demeanour and conduct of the appellant when confronted by the police also showed that the appellant was aware of the cannabis in his possession. (para 20)

(3) Even though there was a person called Romantika, there was no evidence to indicate that on the night in question, Romantika was in all probability the trafficker of the cannabis. On the contrary, the appellant was caught red-handed with the cannabis. Hence, the JC was correct in making a finding of fact that the appellant was the trafficker of the cannabis. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Setelah menerima maklumat bahawa suatu pengangkutan dadah tertentu akan berlaku, PW3 dan sepasukan pihak polis menuju ke kawasan tersebut bagi menjalankan pengawasan. Beberapa minit kemudian, PW3 telah memerhati seorang lelaki ('perayu') menunggang motosikal dan meletakkan kenderaan itu berdekatan

dengan tempat pasukan polis tersebut sedang menunggu. Oleh kerana perayu kekal di atas motosikalnya, PW3 dan pasukannya bertindak dan menyerang hendap perayu. Dalam usaha untuk melarikan diri dari tempat kejadian, perayu cuba melajukan motosikalnya tetapi berjaya diberkas tidak lama selepas itu. Satu beg merah telah ditemui dalam bakul motosikal tersebut. Dua bungkusan mampat bahan tumbuhan ditemui dalam beg tersebut yang disahkan sebagai 1,757.35g kanabis. Di Mahkamah Tinggi, perayu didakwa dengan kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Dalam pembelaannya, perayu berhujah bahawa beliau merupakan pembawa tidak bersalah dan telah diarahkan oleh seorang yang bernama Romantika untuk menghantar beg tersebut, yang mengandungi 'kain dan ubat', kepada seorang yang bernama Aidil. Menurut perayu, beliau tidak mengetahui bahawa kandungan sebenar beg tersebut adalah kanabis. Yang arif Pesuruhjaya Kehakiman ('PK') memutuskan bahawa perayu gagal untuk menyangkal anggapan pengedaran kerana gagal menunjukkan bahawa orang lain adalah pengedar sebenar. Perayu disabitkan atas kesalahan dan dihukum mati. Oleh itu, rayuan ini. Isu yang dibangkitkan untuk penentuan adalah sama ada PK mempertimbangkan pembelaan perayu, iaitu, (i) bahawa perayu adalah pembawa tidak bersalah; dan (ii) bahawa Romantika adalah pengedar sebenar.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Walaupun PK tidak menyebut perkataan 'pembawa tidak bersalah', rekod rayuan telah mengupas pembelaan iaitu pembawa tidak bersalah perayu. Bentuk perkataan yang digunakan oleh PK dalam penghakiman beliau adalah berasaskan pilihannya. Apa yang penting adalah bahawa pembelaan pembawa tidak bersalah telah pun dipertimbangkan dengan secukupnya. Tambahan, PK telah menilai secara kehakiman pembelaan tersebut secukupnya sebelum membuat dapatan fakta yang muktamad.

(2) Pembelaan perayu sebagai pembawa tidak bersalah merupakan satu rekaan. Perayu bersendirian ketika ditangkap dan tiada sesiapa atau mana-mana kenderaan dikesan di kawasan tersebut. Beg tersebut ditemui dalam bakul pembawa motosikal

dan berada berdekatan dengan perayu yang menunjukkan pengetahuan perayu akan kanabis yang dibawanya. Sikap dan kelakuan perayu apabila berhadapan dengan polis juga menunjukkan bahawa perayu mengetahui tentang kanabis yang berada dalam milikannya.

(3) Walaupun wujud seorang yang bernama Romantika, tidak ada bukti untuk menunjukkan bahawa pada malam tersebut, Romantika berkemungkinan adalah pengedar kanabis itu. Sebaliknya, perayu ditangkap bersama dengan kanabis. Oleh itu, PK betul dalam membuat dapatan fakta bahawa perayu adalah pengedar kanabis itu.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(dist)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
R v. Emmanuel [1998] Crim LR 347 ***(refd)***
Samundee Devan Muthu Kerishnan v. PP [2010] 3 CLJ 269 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a)
Evidence Act 1950, s. 8

For the appellant - Gobind Singh Deo (S Prakash with him); M/s Gobind Singh Deo & Co
For the respondent - Kwan Li Sa; DPP

Reported by Najib Tamby

JUDGMENT

Azahar Mohamed JCA:

[1] Nur Azmi bin So'aib (the appellant) was charged in the High Court at Johore Bahru for trafficking in a dangerous drug, that is to say, cannabis weighing 1757.35 grammes under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). The charge reads:

> Bahawa kamu pada 24 Januari 2007, lebih kurang 12.10 tengah malam, di hadapan pagar sebelah kanan Surau Darussalam, Kg Stulang Laut, Jalan Dursu, dalam Daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya iaitu

A 1757.35 gram Cannabis, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

B **[2]** On 16 March 2010, he was convicted and sentenced to the mandatory death penalty prescribed by the Act.

[3] The appellant then appealed to this court. We heard the appeal on 13 September 2011, wherein at its conclusion we unanimously dismissed it. We now give our reasons for so C deciding.

[4] The essential facts as found by the learned Judicial Commissioner are these. On 23 January 2007, at about 11.30pm, ASP Abdul Ghani bin Hj Talib (PW3) and a team of police D officers from the Narcotics Unit acting on information received proceeded to Jalan Surau near Surau Darussalam. They went there in a Proton Gen-2. Upon arrival, they stopped by the roadside opposite a grocery store. The engine and lights of the said car were switched off. They conducted surveillance in the E area.

[5] At about 12.10am, 24 January 2007, PW3 saw a motorcycle bearing registration number JHP 6418 ridden by a male (later identified as the appellant) passing by in front of his car and F stopped near a fence on the right side of Surau Darussalam. The appellant remained on the said motorcycle. Thereafter, PW3 and his team ambushed the said motorcycle and introduced themselves as police. At that point of time, the appellant tried to accelerate his motorcycle in attempting to flee and avoid arrest. A scuffle ensued between the police party and the appellant resulting in the G motorcycle and the appellant falling onto the ground. The appellant was apprehended soon after.

[6] A body inspection upon the appellant revealed nothing incriminating. However, a red bag was found in the carrier basket H of the motorcycle. PW3 took possession of the bag and upon examination of its content, he found two compressed slabs of plant material suspected to be cannabis. The chemist, Mr Jayasilan a/l Sinnathurai (PW2) later examined the compressed slabs and found them to be cannabis as defined under s. 2 of the Act. I PW3 also confirmed the nett weight to be 1757.35g. That, in a summary, is the prosecution's case.

[7] At the end of the prosecution's case, the learned Judicial Commissioner held that a *prima facie* case had been made out against the appellant. He then called upon the appellant to enter his defence.

[8] The appellant elected to give sworn evidence. In essence, it was his defence that on the night of his arrest, he was asked by one Man @ Romantika to send the bag in question to one Aidil. According to the appellant, he was told that the bag contained "kain dan ubat". The appellant maintained that the said bag was not his and that he had no idea that its contents were cannabis.

[9] The appellant also called one witness, Mohd Reza Hairuddin bin Zainal Abidin (DW2) who gave evidence to the effect that Romantika and Aidil were no fictitious characters and that he had also known them.

[10] Before us, the appellant raised two grounds in support of his appeal.

First Ground: Failure To Consider Defence Of Innocent Carrier

[11] On this issue, learned counsel for the appellant argued that the learned Judicial Commissioner seriously misdirected himself when he failed to consider at all the defence of the appellant which was that he was an innocent carrier. He submitted that throughout the case for the prosecution, it was put to the witnesses for the prosecution that the said bag containing the drugs belonged to Romantika and that the appellant did not have knowledge of its contents. It was also put to the witnesses for the prosecution that the appellant was informed by Romantika that the bag contained "kain dan ubat" and the appellant was asked to hand it over to Aidil. He then argued that the failure on the part of the learned Judicial Commissioner to consider the defence of the appellant in itself was reason for the conviction to be set aside as clearly there would have been a serious miscarriage of justice occasioning serious prejudice to the appellant.

[12] We should state at the outset that the defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying a bag containing the dangerous drugs but disputes having knowledge of the drugs. Whether the defence of

A innocent carrier succeeds or not must depend on the facts of each case. In the present case, the appellant's defence was that he was an innocent carrier and that he was deceived by Romantika to carry the cannabis in question. It was the appellant's story that Romantika told him the content of the bag was "kain dan ubat". B The appellant pointed the blame to Romantika.

[13] In the present appeal, simply stated, the critical question which arose for decision was whether the appellant's defence of "innocent carrier" was considered by the learned Judicial C Commissioner.

[14] We agree with learned counsel for the appellant that as a matter of general principle, it is a serious misdirection by way of non-direction, which would occasion a failure of justice and warrant appellate interference, if indeed the learned Judicial D Commissioner had failed to judicially consider at all the appellant's defence of "innocent carrier". It was the duty of the learned Judicial Commissioner to consider that defence, no matter how weak or unreasonable the defence story may be (see: *Ganapathy Rengasamy v. PP* [1998] 2 CLJ 1, *Alcontara Ambross Anthony v. PP* E [1996] 1 CLJ 705 and *R v. Emmanuel* [1998] Crim LR 347).

[15] In this regard, the form of words used by the learned Judicial Commissioner in his judgment is a matter of his choice. A judgment is the expression of the view of a judge arrived at F after due deliberation of the evidence and of the submissions advanced before him. But judges write their judgments in their own style. Each judge has an individual manner or style of expression. For that reason in the context of the present case, what is most important is whether or not in substance and effect G the learned Judicial Commissioner in his judgment had adequately considered and judicially appreciated the defence of the appellant which was that he was an innocent carrier of the bag in question with no knowledge of the cannabis that was in the said bag. This, ultimately, is the test: whether or not the learned Judicial H Commissioner had in his judgment addressed his mind to this critical issue.

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[16] In considering this matter, we had closely scrutinized the judgment of the learned Judicial Commissioner. It is true that when dealing with the appellant's defence, the learned Judicial Commissioner did not mention the words "innocent carrier" in his judgment. However, a careful reading of the judgment reveals that the learned Judicial Commissioner had in substance at pp. 81-83 (paras. 51-53) of the appeal record narrated the appellant's defence of "innocent carrier". He took exceptional care to consider and judicially appreciated it at some length before coming to a definite finding of fact on the very essence of the appellant's defence of "innocent carrier". In the words of the learned Judicial Commissioner:

> Keterangan tertuduh beliau mahu menghantar kain dan ubat sukar diterima memandangkan waktu tengah malam bukanlah satu keadaan yang biasa untuk menghantar ubat dan kain, lebih-lebih lagi penghantaran daripada seorang kepada seorang yang lain yang masing-masing tinggal dalam kampung yang sama.

[17] Clearly, the learned Judicial Commissioner had directed his mind to the appellant's defence of "innocent carrier" when he said those words. In doing so he had judicially appreciated and considered the defence of "innocent carrier".

[18] Again in the words of the learned Judicial Commissioner:

> Pembelaan tertuduh hanyalah rekaan semata-mata dan hanyalah satu pemikiran terkemudian.

[19] In arriving at this finding, it is quite clear that the learned Judicial Commissioner had critically appraised the appellant's defence of "innocent carrier". Accordingly we find no merit in the complaint that the learned Judicial Commissioner had not considered or adequately appreciated the defence of "innocent carrier".

[20] We had ourselves carefully scrutinized the whole of the evidence in the appeal record in the light of the criticisms addressed by learned counsel for the appellant. The appellant at the time of his arrest was observed by PW3 to be alone from the moment he was first spotted. PW3 confirmed that no one else was spotted in the vicinity. There was also no other motorcycle or a Proton Iswara as claimed by the appellant. The bag in question

was found in the carrier basket of the motorcycle and it was in a very near proximity to the appellant. PW3's evidence was also relevant to show the appellant's knowledge as to the cannabis he was transporting. The demeanour and conduct of the appellant when confronted by PW3 are relevant and admissible under s. 8 of the Evidence Act 1950. The appellant did not stop but instead accelerated his motorcycle when PW3's team identified themselves as police by shouting "Polis, jangan bergerak!". The appellant's demeanour and conduct at that point of time would show that the appellant was aware of the cannabis in his possession (see: *Parlan Dadeh v. PP* [2009] 1 CLJ 717 and *Samundee Devan Muthu Kerishnan v. PP* [2010] 3 CLJ 269). It was a reaction driven by guilt. In our view, the appellant's defence of "innocent carrier" was an afterthought. It was incapable of raising a reasonable doubt on the prosecution case.

Second Ground: Failure To Consider That Romantika Was The Real Trafficker

[21] The arguments by learned counsel for the appellant here were two pronged. In the first place, it was argued that the learned Judicial Commissioner failed to consider the defence that Romantika was the real trafficker. Secondly that the learned Judicial Commissioner had failed to direct his mind and consider whether or not the appellant had raised doubts and/or rebutted the presumption of trafficking by showing that someone else was the real trafficker. Learned counsel relied on the decision of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 to support his submission.

[22] We were unable to accept these submissions. In our view, the facts in *Mohamad Radhi v. PP* are readily distinguishable from those in the present case. It must be borne in mind that unlike *Mohamad Radhi*'s case, in the present case, even though there was a person called Romantika, there was no evidence before the learned Judicial Commissioner to indicate that on the night in question Romantika was in all probability the trafficker of the cannabis in question. On the contrary, the learned Judicial Commissioner observed that the appellant was caught red-handed

with the cannabis and that on the night in question he made a finding of fact that the appellant was the trafficker of the cannabis. In the words of the learned Judicial Commissioner:

> Sebenarnya tertuduh telah ditangkap secara 'red handed' dengan barang kes dadah yang dalam proses **untuk diedarkan** kepada orang lain. (emphasis added)

[23] On the facts of the present case, in our view, the learned Judicial Commissioner was entitled and correct in making such a finding.

[24] Further down in his judgment, the learned Judicial Commissioner then continued:

> Pada akhirnya, setelah mendengar dan meneliti keseluruhan keterangan yang dikemukakan oleh kedua-dua pihak, mahkamah mendapati bahawa pihak pembelaan telah gagal untuk menimbulkan sebarang keraguan yang munasabah terhadap kebenaran kes pihak pendakwaan. Mahkamah juga mendapati atas imbangan kebarangkalian, pihak pembelaan telah gagal untuk mematahkan anggapan pengedaran di bawah seksyen 37(da)(vi) yang terpakai dalam kes ini.

[25] We were in agreement with the learned Deputy Public Prosecutor that the learned judicial commissioner directed himself quite rightly along the approach indicated in *Mohamad Radhi Yaakob v. PP*. We found no merit in the arguments of learned counsel for the appellant under this head of complaint.

Conclusion

[26] We had scrutinised the judgment of the learned Judicial Commissioner. We found no good reasons why we should interfere with his findings of facts. We found that the learned Judicial Commissioner had not misdirected himself on the law. The decision of the learned Judicial Commissioner was neither perverse or against the weight of evidence. We were wholly convinced that at the material time and place, the appellant knew he was carrying cannabis and that he was not an innocent carrier. In our judgment, the totality of the evidence, the surrounding circumstances and the conduct of the appellant when taken together irresistibly point to the appellant having knowledge of the offending drug at the material time.

A **[27]** We had, therefore, dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned Judicial Commissioner upon the appellant.

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